IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, VA.

WEST DISINFECTING CO. *v.* F. V. GUNN.

April 2, 1913.

1. **Motion for Judgment under § 3211 of the Code—Nature of Remedy**—The proceeding by motion for judgment is simply a new remedy which applies to certain causes of action coming within the ordinary and well-recognized jurisdiction of the courts, and in which the notice takes the place of the writ and declaration.

2. **Motion for Judgment under § 3211 of the Code—Venue—Appearance as Waiver.**—Although it is required that the motion be brought in the county in which the defendant resides, this is merely a matter of venue and where a defendant, not a resident of the county or city where the motion is brought appears and pleads, he waives his right to object.

3. **Motion for Judgment under § 3211 of the Code—Jurisdiction—Time to Plead.**—Where the court has jurisdiction over the cause of action and the defendant has been served with notice and appears and pleads, he cannot, for the first time, after trial and verdict raise the question of jurisdiction over the person arising out of his place of residence.

4. **Motion for Judgment under § 3211—Pleading—Necessity for Alleging Residence of Defendant.**—In a proceeding by motion for judgment it is unnecessary to allege in the notice the residence of the defendant.

STATEMENT OF FACTS.

Proceeding by motion under § 3211 of the Code against the defendant for balance due under a contract for the sale to defendant of certain articles of merchandise. Notice of the motion served on defendant in Richmond and return duly made by sheriff of the city. Defendant appeared, pleaded and filed a special plea of offset under the statute claiming a recovery over against the plaintiff.

On the trial a verdict was rendered for the plaintiff, and against the defendant on the special plea.

Defendant then moved to set aside the verdict, and in connection with this motion filed his affidavit, in which he stated that, at the time the proceeding was instituted he was, and at all times since had been, a resident of and domiciled in the county of Henrico, and not in the city of Richmond. The defendant then further moved the court to set aside the verdict and dis-

miss the entire proceedings on the ground that the court was without jurisdiction to entertain and try the case under § 3211 of the Code because the defendant did not reside in the city of Richmond.

This motion was overruled by the court and judgment entered on the verdict of the jury.

Upon application to the Supreme Court of Appeals for a writ of error, based upon the ruling of the trial court in refusing to dismiss the proceedings for lack of jurisdiction, the writ of error was refused.

Montague & Montague, P. Q.
Jno. Garland Pollard, P. D.

OPINION.

BEVERLEY I. CRUMP, J.: As the motion to dismiss upon the ground appearing in the affidavit of defendant, is made after appearance, trial and verdict, the Court cannot entertain it unless the Court is entirely without jurisdiction over the subject-matter of the action, so that all proceedings therein are void.

It is clear that the Court has jurisdiction to hear and determine cases of the general class to which this case belongs. Being a court of record and of general jurisdiction it has authority to try all cases properly before it in which money due by any contract is sought to be recovered.

Section 3211 does not enlarge the jurisdiction of the Court. It only creates a new remedy. Where the jurisdiction of the Court is enlarged—that is, when a new right not theretofore existing is created by statute and at the same time a remedy is provided for the enforcement of the new right—the remedy may become a part of the right in a jurisdictional sense. Thus in the case of a proceeding for death by wrongful act no court had jurisdiction until it was conferred by the statute, and as the statute requires the right to be prosecuted within twelve months, this limitation is a part of the statutory right itself, and becomes a jurisdictional requisite. The same is the case under the mechanic's lien statute. See Dowell *v.* Cox, 108 Va. 460; Savings Bk. *v.* Powhatan Clay Co., 102 Va. 274, 15 Va. Law Reg. 840.

The case of R. R. Co. *v.* Com., 104 Va. 314, involved the right of a private individual to proceed by quo warranto to have a charter forfeited. As no court has general jurisdiction over such a proceeding, except at the instance of the Commonwealth, and as the Court held that the statute had not enlarged that jurisdiction so as to embrace a private individual as complainant, the lower Court was clearly without jurisdiction.

The long line of decisions relating to § 3211 show that this stat-

ute has been regarded simply as creating a new remedy which is to apply to certain causes of action coming within the ordinary and well recognized jurisdiction of the courts. The latest cases, citing some of the prior cases, seem to be Mundy *v.* Garland, 112 Va. 743, and Whitley *v.* Booker Brick Co., 116 Va. 434.

It is clear that this proceeding by motion is simply a remedy in which the notice takes the place of writ and declaration and, while it is required to be brought in the county or city in which the defendant resides, this is merely a matter of venue which may be waived by the defendant by appearance and pleading. Such is manifestly the result of the line of cases just referred to, considered in connection with the two cases more nearly parallel with this case, viz.: Morotock Ins. Co. *v.* Pankey, 91 Va. 259; Reid & McCormick *v.* Gold, 102 Va. 40.

As the Court here has jurisdiction over the cause of action set out in the notice of the motion, and the defendant has waived all objection to jurisdiction over the person by appearing and pleading, it is too late to raise the question of the jurisdiction of the Court over the person of the defendant on the ground that he does not reside in Richmond.

In the case of Carr *v.* Bates, 108 Va. 376, the question of jurisdiction over the defendant was seasonably raised by a motion to quash the summons and return.

In Coleman *v.* Stave Co., 112 Va. 75, the court holds, in accordance with the general principle above pointed out, that when a new subject of jurisdiction is created by statute, and the mode of exercising it is prescribed by the statute, a substantial compliance with the remedy prescribed by statute is essential, otherwise the proceeding is a nullity.

In the case of Mayor *v.* Hunter, 2 Munf. 228, the Court seems to hold that in proceeding by motion under the statute then before the court, it was essential to allege and prove as a jurisdictional requisite, that the defendant was a resident of the county or city in which the motion was made. It is not necessary to enquire into the general jurisdiction of the Court before which the motion was made, nor as to the character of the statute before the Court, in that case, as our Court of Appeals has manifestly ruled that it is not essential, under § 3211 to allege in the notice the residence of the defendant.

As an original question, it was certainly open to considerable doubt whether any court, except the court of residence of the defendant, could acquire jurisdiction in a proceeding by motion under § 3211 under any circumstances.

But considering the numerous cases in which questions of procedure under that statute have been discussed, it is impossible to reach any other conclusion than that the defendant, if he is reg-

ularly served with the notice and appears, pleads and tries the case, must be held to have waived all questions of jurisdiction over the person arising out of his place of residence.

I have examined all the instructions carefully and taken in connection with the issues upon the notice and special plea, I think they presented the law of the case to the jury in a manner as favorable for the defendant as could be expected.

The case was one for the jury and the Court does not feel warranted in interfering with the verdict.

The motion to dismiss and the motion for a new trial will be overruled.

SUPREME COURT OF APPEALS OF VIRGINIA.

SHIFLETT *v.* COMMONWEALTH.

March 20, 1913.

[77 S. E. 606.]

1. Intoxicating Liquors (§ 208*)—Offenses—Indictment—Time of Offense—Negativing Limitations.—While, under Code 1904, § 3999, providing that an indictment shall not be invalid for omitting to state the time at which the offense was committed, the indictment for unlawfully selling intoxicants need not allege the precise time of the sale; it must allege facts showing that the offense charged was committed within the period of limitations.

[Ed. Note.—For other cases, see Intoxicating cases, see Intoxicating Liquors, Cent. Dig. §§ 228, 261; Dec. Dig. § 208.*]

2. Indictment and Information (§ 60*)—Sufficiency.—An indictment is not good as a rule, unless, assuming its allegations to be true, it shows a prima facie case for punishment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. § 60.*]

3. Indictment and Information (§ 60*)—Sufficiency.—The indictment is insufficient if it may be true without making accused guilty of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. § 60.*]

4. Intoxicating Liquors (§ 208*)—Offenses—Indictment.—An indictment which recited that it was found at the December term, 1912, and charged that accused "within 12 months on the last preceding 191—, in the said county," did sell, etc., without a license, sufficiently

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.